121

Supreme Court, U.S.
FILED
FEB 26 2009
OFFICE OF THE CLERK

(17) (17)

Nos. 07-1428, 08-328

IN THE

Supreme Court of the United States

FRANK RICCI, ET AL.,
Petitioners,
v.
JOHN DESTEFANO, KAREN DUBOIS-WALTON, THOMAS UDE, JR., TINA BURGETT, BOISE KIMBER, MALCOLM WEBER, ZELMA TIRADO, AND CITY OF NEW HAVEN,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

Peter J. Ferrara
Counsel of Record
Carlos S. Ramirez
American Civil Rights Union
175 Baron Cameron Station Blvd.
Alexandria, VA 22304
703-582-8466

Attorneys for *Amicus Curiae*
American Civil Rights Union

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BOTH 4CVTOL

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

INTEREST OF THE *AMICUS CURIAE*.....1

INTRODUCTION.....2

STATEMENT OF THE CASE.....3

SUMMARY OF ARGUMENT.....6

ARGUMENT.....7

I. RESPONDENTS' RACE-BASED REFUSAL TO PROMOTE PETITIONERS IS SUBJECT TO STRICT SCRUTINY ANALYSIS UNDER THE EQUAL PROTECTION CLAUSE.....7

II. RESPONDENTS' RACE-BASED DECISION TO DISREGARD THE EXAM RESULTS AND NOT PROMOTE PETITIONERS FAILS STRICT SCRUTINY.....9

A. Respondents have not articulated any compelling interest that would justify their racially motivated denial of Petitioners' earned promotions. 9

B. Respondents' action was not narrowly tailored. .10

III. ALLOWING THE RESPONDENTS' ACTION TO PASS OR EVADE STRICT SCRUTINY WILL UNDERMINE PUBLIC POLICY AND ENCOURAGE RACE-BASED HIRING PRACTICES.....11

CONCLUSION.....13

TABLE OF AUTHORITIES

CASES

Adarand Constructors, Inc. v. *Pena*, 515 U.S. 200 (1995).....*passim*

Hunter v. Erickson, 393 U.S. 385 (1969).....7

People Who Care v. *Rockford Board of Educ., Sch. Dist. No. 205*, 111 F.3d 528 (CA7 1997)....10, 12

Washington v. *Davis*, 426 U.S. 229 (1976).....7, 10

CONSTITUTION

U.S. Const. Amdt. XIV, §1 .....*passim*

INTEREST OF THE *AMICUS CURAIE*[1]

The American Civil Rights Union (ACRU) is a nonpartisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time Reagan policy advisor and architect of modern welfare reform Robert B. Carleson, and since then has filed *amicus curiae* briefs on constitutional law issues in cases all over the country.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; former Federal Appeals Court Judge and Solicitor General Robert H. Bork; Pepperdine Law School Dean Kenneth W. Starr; former Assistant Attorney General for Civil Rights William Bradford Reynolds; John M. Olin Distinguished Professor of Economics at George Mason University Walter Williams; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This case is of interest to the ACRU because we want to ensure that all constitutional rights are fully protected, not just those that may advance a

---

[1] Peter J. Ferrara and Carlos S. Ramirez authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and were timely notified.

particular ideology. This includes the guarantee of Equal Protection against racial discrimination provided by the Fourteenth Amendment.

INTRODUCTION

The United States Constitution provides the groundwork for a society in which race is an irrelevant factor in determining the qualifications of an individual. We are blessed to live in a society in which the value of a person is determined by their character, intellect, achievements and constitution. The Equal Protection Clause sets forth the inviolable principles of race neutrality and equal treatment. These principles, the Court has ruled, are not advanced by discriminating against one to benefit another. The only way to stop invidious, government-endorsed discrimination is to strictly scrutinize governmental practices that use racial distinctions, considerations and motivations, and permit them only in the narrowest of terms to correct intentional discrimination by government.

The New Haven Charter and Connecticut state law require a fair and equitable civil service system, grounded on merit-based promotion consideration for its employees. However, that principle was tucked away in a drawer, when under the guise of remedying discrimination, the Respondents changed the rules mid-game to the detriment of Petitioners. Petitioners took a promotion exam, believing that the results on the exam were binding, and that those who scored at the top would be promoted. Respondents went back on their word and broke their own policy, when for race-

based reasons they refused to certify the promotion tests Petitioners took. Respondents are doing nothing more than telling veterans of the civil service that they are not deserving of promotion for no reason other than their race.

STATEMENT OF THE CASE

When command-level vacancies came up in the New Haven fire department, the city sought to fill those vacancies using a merit-based, race-neutral civil service exam as required by local law. Petitioners took this exam and were deemed eligible for promotion based on their superior scores, but were denied promotions by the city because the results of the examination were racially disparate. New Haven then announced its intention to leave the vacancies open, and intended to repeat the competition for promotion, using a system that aimed to promote a higher number of minority candidates.

New Haven's Charter requires a competitive, merit-based promotions system, requiring that all positions in the civil service be filled by the most knowledgeable and able individuals, as determined by job-related examinations. These examinations may not take race into account when determining eligibility. Pet.App. 74a-77a, 80a-82a. After each examination, the civil service board must certify a ranked list of eligible candidates to fill the vacancies. This list consists of candidates who scored at least seventy percent on the examination. The Board of Fire Commissioners has implemented a "Rule of Three," requiring that the board fill existing

vacancies from the top three scorers on the list, as a method of preventing political patronage, discouraging favoritism, and ensuring the selection of the most qualified candidates. Pet.App. 88a-90a, 104a-106a.

Respondents made significant efforts to ensure that the 2003 promotion exams were job-related and race-neutral, even hiring an out of state firm to develop the promotional examination in a manner that tested the knowledge, skill and abilities of the candidates for promotion fairly and accurately. The exam included all the subjects that a multi-disciplinary agency like the New Haven Fire Department would require its lieutenants and captains to be familiar with, and focused on testing those factors. Pet.App. 160a-161a, 267a-268a, 338a.

The record below shows that the developers of the exam went to great lengths to ensure that the exam was job-related and race-neutral, including making multiple changes to their draft test in order to accommodate concerns, ensuring that all items tested were available on source material, and wrote the exams below the tenth grade reading level to mitigate any disparate impact.

Adding to Respondents efforts to mitigate any impact of race, New Haven also provided for an oral portion to the examination before an examination panel, complete with rigid, consensus based scoring guidelines, and providing candidates with the opportunity to organize their thoughts in writing before answering verbally. Pet.App. 164a-168a.

New haven race-coded the candidates, and the scoring results revealed racial disparities comparable to previous years. Candidates of all races passed both exams and were eligible for promotion. However, due to the number of vacancies and the rule of three, no minorities would be promoted to lieutenant and two Hispanics would be promoted to captain. Later, three vacancies arose that would promote three African-Americans to lieutenant. Pet.App. 235a-236a, 305a-306a.

Respondents then attempted to impugn the validity of the examinations. They first claimed flaws in the test, which the testing agents denied. Respondents refused to accept a report from the testing agents elaborating on the testing method's scoring methodology and content. Pet-App. 190a-191a, 287a, 329a-339a.

The Respondents then engaged in other efforts to decertify the exam. The Civil Service Board met, and heard testimony of adverse impact from the written exams. One of the opinions rendered to the board, by a competitor of New Haven's chosen testing agency, claimed that he could develop a test with less disparate impact, albeit without ever having seen the exam actually administered. Pet.App. 548a-549a.

The board finally abandoned the list on the urging of the mayor and other witnesses. The Chief and Assistant Chief of the fire department were not allowed to speak before the board. Pet.App. 228a-229a, 458a-459a, 575a-582a, 817a-818a, 845a-852a. The board deadlocked and the promotions were disapproved. The mayor had been prepared to

override a board vote with an executive order to prohibit the fire department from promoting anyone. Pet.App. 590a-591a, 819a-820a.

Petitioners then filed this action in U.S. District Court under 42 U.S.C. §1983 alleging a violation of the Equal Protection Clause, accompanied by right-to-sue letters from the EEOC. The district court granted summary judgment against Petitioners, a judgment the court of appeals affirmed in a one-sentence order.

This Court granted certiorari.

SUMMARY OF ARGUMENT

Respondents' cancellation of Petitioners' promotion was based solely on their race and is a violation of the Equal Protection Clause. The Equal Protection Clause subjects racially motivated government action to strict scrutiny analysis, and requires a compelling government interest advanced by narrowly tailored means to sustain a racially motivated government action.

Respondents have not articulated any compelling interest to advance, and claim only that promoting Petitioners would make them liable for disparate impact claims under Title VII. The Equal Protection Clause does not and cannot permit government to intentionally discriminate on the basis of race to avoid unintentional discrimination on the basis of race. Even if this interest were to be found to be compelling, Respondents' action was not narrowly tailored. Respondent cancelled the

promotions after disparate impact was evident, and did so bending to political pressure. Respondents took exhaustive measures to mitigate disparate impact prior to administering the promotion exam and had the opportunity to take further measures, but refused. The cancellation of the promotions at such a late stage was not and cannot be considered a narrowly tailored means to achieving a compelling state interest.

Allowing Respondents' actions to pass or evade strict scrutiny would result in governments being forced to intentionally discriminate in order to avoid unintentional discrimination, creating a result that goes against the spirit and letter of the Fourteenth Amendment to the Constitution and would inevitably create a divisive, rancorous environment in government agencies that refuse to promote qualified applicants because of their race.

ARGUMENT

I. RESPONDENTS' RACE-BASED REFUSAL TO PROMOTE PETITIONERS IS SUBJECT TO STRICT SCRUTINY ANALYSIS UNDER THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause disfavors racially motivated government action, requires that such action be strictly scrutinized, and results in it being invalidated in all but the rarest of circumstances. See, *e.g.*, *Hunter v. Erickson,* 393 U.S. 385 (1969) (Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official

distinctions based on race, racial classifications are "constitutionally suspect," and subject to the "most rigid scrutiny." They bear a far heavier burden of justification than other classifications.). The Courts view racially motivated government action with hostility and skepticism, as equal treatment of race is the absolute core of the guarantee of the Equal Protection Clause. See *Washington* v. *Davis*, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.").

In order to memorialize the Constitution's command to avoid racially motivated distinctions, the Court has made clear that all race-based government actions are subject to the strictest of scrutiny, requiring a showing by government that the race-based action is narrowly tailored to achieve a compelling government interest. See *Adarand v. Pena*, 515 U.S. 200, at 227 (1995)(plurality opinion). The Court has found few governmental interests compelling enough to justify race-based treatment, and fewer actions narrowly tailored to achieve such an interest. Even when race-based actions are taken in order to benefit minorities with no animus to whites, the policies are not insulated from strict scrutiny analysis. See *Adarand, Id.* at 226.

Petitioners were denied promotion due to thei race. Respondents articulated no other grounds and availed themselves of no other claims that their decision to refuse to certify the promotions list was based on any factor other than race. Respondents' attempt to characterize their actions as an attempt

to comply with Title VII does not shield their action from scrutiny. New Haven officials acted on racial identification of the promotion candidates as the primary motivation for their actions. Respondents' action to block Petitioner's promotions was motivated exclusively by race.

The Court in *Adarand* stated that "whenever the government treats any person unequally because of [his] race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of Equal Protection." *Adarand,* 515 U.S., at 229-230. Petitioners were not promoted due to their race. Respondents do not deny that had more minority candidates been eligible for promotion, they would not have challenged the results of the promotion exam. Respondents did not articulate a race-neutral reason for denying the promotions.

The fact that no one was promoted is irrelevant here. Petitioners suffered harm because they would have been promoted and were not. They were not promoted because the civil service board had a race-based goal in mind, and took a clear government action in order to advance that goal in a manner that resulted in harm to Petitioners.

II. RESPONDENTS' RACE-BASED DECISION TO DISREGARD THE EXAM RESULTS AND NOT PROMOTE PETITIONERS FAILS STRICT SCRUTINY.

A. Respondents have not articulated any compelling interest that would justify their racially motivated denial of Petitioners' earned promotions.

Respondents did not allege that they sought to achieve diversity or reverse prior discrimination as a motivation for denying Petitioners' promotions. The only remotely articulable interests espoused by Respondents were the avoidance of a Title VII violation,[2] and fear of political reprisal[3].

Allowing a government to engage in intentional racial discrimination to avoid a lawsuit for unintentional racial discrimination would result in pervasive discrimination flying in the face of the Fourteenth Amendment's Equal Protection Guarantee. Here, as evidenced by Respondents' extensive attempts to secure a race-neutral, job-related, merit-based method of testing that was developed and evaluated by outside professionals for validity, there is clear evidence that there was no unintentional discrimination, and that Respondents' actions in cancelling the promotions were an after-the-fact, invidious, intentional use of race as a factor to determine promotional eligibility.

Avoiding a Title VII disparate impact claim cannot justify intentional, race-based disparate treatment. See *People Who Care* v. *Rockford Board of Educ., Sch. Dist. No. 205*, 111 F.3d 528, 535 (CA7 1997). Allowing the avoidance of a Title VII lawsuit to become a compelling state interest would necessarily force governments to hire by quota, and

---

[2] Pett.App. 47a

[3] Pet.App. 812a-816a, 882a-883a.

inevitably result in intentional discrimination in order to avoid lawsuits. The Equal Protection Clause prohibits only intentional discrimination, not disparate impacts. See *Washington v. Davis,* 426 U.S. 229, at 242 (1976).

If the Constitution were to allow fears of disparate impact liability to constitute a compelling state interest, the stage would be set for organized racial lobbies to engage in political efforts with noxious and divisive results, promoting notions of racial inferiority and leading to racial hostility.

B. Respondents' action was not narrowly tailored.

Respondents' remedy of its fear of disparate impact consisted of cancelling all promotions after the test had been given, scored, and a ranked list of candidates had been prepared. This action does not remotely meet the Constitutional requirement of narrow tailoring. There was no showing that respondents relied on racial classifications in a manner that was tailored in any way to their articulated interests.

Assuming *arguendo* that a fear of Title VII disparate impact claims is a valid, compelling state interest, the cancellation of the promotions after the administration and scoring of the test and the ranking of the candidates is by no means a narrowly tailored method. Respondents went to great lengths to ensure that the examinations would mitigate any anticipated adverse impact. Respondent did not present any valid alternatives to the testing with less disparate impact, and were aware that prior

promotion tests had shown disparate impact.

The city had a clear opportunity prior to administering the tests to make further attempts to reduce disparate impact and did not do so. Taking further measures to reduce disparate impact after the exams had been announced, studied for, administered and scored is not a narrowly tailored way to achieve any sort of interest, other than politically motivated racism. By cancelling promotions, Respondents achieved no reduction in disparate impact and caused injury, frustration and pain to Petitioners who dedicated extensive time and money to prepare for the examination, only to be later rejected because of their race.

III. ALLOWING THE RESPONDENTS' ACTION TO PASS OR EVADE STRICT SCRUTINY WILL UNDERMINE PUBLIC POLICY AND ENCOURAGE RACE-BASED HIRING PRACTICES.

In order to achieve promotion to command ranks, Petitioners underwent a grueling, two-part examination that required months of study and preparation. For Petitioners, their efforts paid off. They took their promotion tests and scored high enough to rank for promotion. Respondents negated Petitioners efforts by not honoring the results of the exam.

Respondents' went to great lengths to ensure that the test fairly and accurately measured the knowledge skills and abilities required of command rank positions in the New Haven Fire Department, and Petitioners unquestionably met these standards.

The New Haven tests were a glowing example of a purely merit-based process for selecting candidates for promotion.

However, under the guise of racial equality, New Haven has allowed racial considerations and political correctness to become the primary deciding factor by which promotions are determined, reducing merit and individual achievement to a lesser lever of importance, and allowing for political considerations to take a greater role in the process. Respondents have thus deprived the residents of New Haven of its most qualified servants, as determined by valid, appropriate, merit-based and fair civil service exams. See *People Who Care v. Rockford Bd. of Educ., School Dist. No. 205* 111 F.3d 528, 535 (C.A.7 (Ill.),1997) (warning of "the almost certain consequence that the teachers it was hiring would on average not be as good as if it were on the basis purely of merit").

Disaster strikes randomly and without prejudice. At a time when the public safety requires that its first responders be well trained, well equipped and well supervise, the community will likely not care whether the captain of the fire company is black, white or latino. The family watching their house burn does not care about the race of the fire lieutenant in charge of the group trying to stop the calamity.

However, there is nothing more divisive, more detrimental to the morale of a fire department, than a company that feels that their captain or lieutenant was promoted to that spot simply because of his race. A color-blind society cannot exist where government

disregards the efforts of dedicated public servants to pass an advancement test in order to promote less qualified individuals merely because of race. When a house is on fire, when lives are on the line, when important decisions have to be made, it is not the time to herald the artificial diversity of the command ranks of the fire company, but it is the time to rest assured that the rescuers responding are led by the best. It is impossible to guarantee that the best are in charge, when the best, as determined by a job-specific, race-neutral, merit-based test, are refused advancement because of their race.

CONCLUSION

For the above stated reasons, the judgment of the Second Circuit should be reversed.

Peter Ferrara
Counsel of Record
Carlos Ramirez
American Civil Rights Union
175 Cameron Station Blvd.
Alexandria, VA 22304
703-582-8466

Counsel for Amicus Curiae
American Civil Rights Union